United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2105

To be Argued by:
STEPHEN M. LATIMER, ESQ.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MICHAEL WILLIAMS,

Plaintiff-Appellee,

-against-

NO. 76-2105

BENJAMIN WARD, Commissioner of the Department of Correctional Services and HON. "JOHN" HEMMOCK, Chairman, New York State Parole Board,

Defendants-Appellants.

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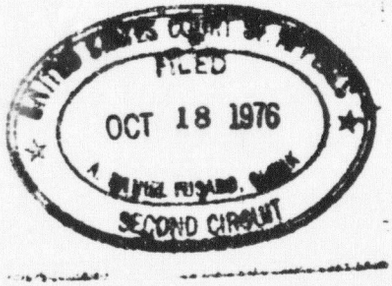
P/S

APPELLEE'S BRIEF

Respectfully Submitted,



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PRELIMINARY STATEMENT

More than one month before his scheduled appearance before a panel of the New York State Parole Board, Plaintiff, pro-se, commenced an action pursuant to 42 U.S.C., §1983, in the United States District Court for the Southern District of New York, seeking a declaratory judgment and an injunction requiring Defendants to expunge certain false and deleterious information from his records (15a). Upon the Defendants' failure to answer and their repeated failure to submit evidence bearing on the issues to the court and after he had been

denied parole, Judge Knapp granted Plaintiff judgment by default; required Defendants to make available to him the adverse information in his file, and to grant him a new parole release hearing at which he may rebut that information (72a). Defendants appeal from that default judgment.

QUESTIONS PRESENTED

1. Did the District Court properly grant judgment by default in favor of Plaintiff when, in disregard of repeated requests by the Court, and in disobedience of the District Court's order, Defendants refused to come forward with evidence sufficient to defeat Plaintiff's motion for summary judgment?

2. Did the New York State Department of Correctional Services deny Plaintiff his right to due process of law when it refused to disclose adverse material in his institutional and parole file, and therefore denied him the opportunity to rebut that information?

3. Did the dismissal of a habeas corpus petition in the United States District Court for the Eastern District of New York, U.S., Ex. Rel. Williams v. Caldwell, 75 Civ. 1948 (O.G.J.) bar the Court below from determining this civil rights action for declaratory and injunctive relief?

STATEMENT OF THE CASE

A. Prior Proceedings

Appellee here, Plaintiff below, is a prisoner in the custody of the New York State Department of Correctional Services, serving a sentence of twenty years to life upon conviction after plea of guilty on May 27, 1964 to the crime of murder in the second degree (5a). He became eligible for parole consideration on September 1, 1975 under Correction Law §212-a.

In April, 1975, Mr. Williams received information that his file contained certain false information labelling him as emotionally disturbed (8-a). Administrative attempts to have the material expunged were futile (10-a). Consequently, on August 6, 1975, about a month prior to his scheduled parole hearing, this action was filed and prosecuted pro-se. Examination of the record reveals that from the inception, Defendants have exhibited callous indifference toward the Plaintiff and the substantial issues raised in the complaint even admitting, after their default, that the case was "lost in the shuffle" (61-a). This indifference is demonstrated by a total disregard of time limitations established by the Federal Rules of Civil Procedure and the orders of the court below.

The summons and complaint were served on August 27, 1975 (1-a). Defendants neither answered the complaint nor

requested an extension of time to answer prior to September 17, 1975, the time imposed for such action by F.R.C.P., §12(a). Plaintiff moved for a default judgment pursuant to F.R.C.P. 55(b)(2) on October 14, 1975 (18-a). Only in response did Defendants request an extension of time to answer (19-a). The extension was granted in the exercise of the Court's discretion (19-a).

Defendants then moved to dismiss the complaint. Judge Knapp denied the motion by order dated December 8, 1975. Although, Defendants were required by F.R.C.P. §12(a) to serve and file an answer by December 18, 1975, no answer was ever interposed.

On December 30, 1975 Plaintiff moved for summary judgment. The subsequent defaults were described by the District Court in its order of June 9, 1976 granting Plaintiff summary judgment by default (53-a - 54-a):

> Upon the defendants' failure to timely respond to said motion, the Court wrote a personal letter to the Attorney General, Louis Lefkowitz, requesting a response. On January 29, 1976, the Asst. Attorney General assigned to the case filed an Affidavit in Opposition which is inadequate. On March 31, 1976, the Court requested in writing, that the attorney General provide it with copies of all the papers filed in an unrelated action of plaintiff's pending in the Eastern District. On April 7, 1976, we issued a Memorandum and Order noting the numerous deficiences in the defendants' Affidavit in Opposition, and ordering Attorney General within twenty days of the date of the decision, to:

a) File the appropriate R. 9 (g) statement and any affidavits in support thereof which they deem important.

b) Turn over to the Court for in camera inspection, all material in plaintiff's institutional files which contain any reference to his alleged mental instability, including the alleged threats.

c) File a Memorandum of Law addressed to the issues raised in the complaint, as defined in the Memorandum and Order of the Court dated December 8, 1975.

To date, that office has failed to comply in any respect with this order issued two months ago.

Still seeking to take unfair advantage of a pro-se litigant and as further evidence of their lack of good faith, Defendants sought to vacate their default on June 25, 1976 by an experte communication to the Court (Annex #1). The District Court recognized the unfairness of that procedure and required submission of a formal motion. On July 9, 1976, 30 days after the order granting judgment by default was entered, and 70 days after the time expired for submission of material requested by Judge Knapp, Defendants, in their belat-d attempt to vacate the default finally submitted: a) a Rule 9-G Statement (64-a), b) a Memorandum of Law, and c) for in camera inspection by Court the material classifying Plaintiff as emotionally disturbed (64-a). After considering the proferred excuses and

the material submitted to it, the District Court in the exercise of its sound discretion refused to disturb its prior ruling and directed the Defendants to turn over to Plaintiff the relevant documents from his file making appropriate provision for preserving the confidentiality of that material (72-a). An application for a stay was denied by the District Court on August 2, 1976 (74-a). Judgment was entered on August 5, 1976 (75-a), and a Notice of Appeal was filed at 5:00 p.m. on September 7, 1976.[1]

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1. Defendants continue to demonstrate their lack of good faith in this court. The appendix filed by Defendants contains the following entry under the hearing "Relevant Docket Entries" (2-a):

   "8-7-76 (20) Filed Deft's Notice to Appeal to the USCA..."

   A photocopy of the docket sheet shows that the Notice of Appeal was actually filed on September 7, 1976.

   Further, although the District Court denied the stay on August 2, 1976, and Defendants were required to turn over the relevant documents to Plaintiff by September 7, 1976, (76-a), the Defendants did not move this court for a stay until September 10, 1976. At their request, the motion was put on the motion calendar for September 14, 1976. Plaintiff, still proceeding pro-se, did not have actual notice of the motion before September 14th. Even if he had received notice, because he is incarcerated, he would not have been able to respond by that date.

   When this Court granted the stay it established an expedited briefing schedule and required appellants to submit a Brief by September 30, 1976. On October 1, 1976 appellants moved for an enlargement of time to and including October 5, 1976. The motion was granted, but their Brief was not filed until October 6, 1976.

B. Nature of The Case

The District Court, construing the pro-se complaint liberally, Haines v. Kerner, 404 U.S. 519 (1972), interpreted the complaint to allege a denial of due process of law because, on the basis of certain information in his file, unknown to him, and therefore unrebuttable, he was denied privileges and programs available to prisoners under New York State Law, and his parole eligibility was severely limited (21-a). Accordingly, Judge Knapp, following this Court's precedent in Cardaropoli v. Norton, 523 F. 2d 990 (2nd Cir., 1975) fashioned an equitable remedy within the scope 42 USC 1983. It ordered disclosure of the information, and granted a new parole release hearing at which he could rebut the information which purports to classify him as mentally or emotionally disturbed.[2]

In their motion to vacate the default, the Defendants for the first time reveal that the information upon which

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2. As construed by Judge Knapp, the action is not a habeas corpus petition. Plaintiff does not challenge the fact or duration of his imprisonment, nor does he seek immediate release therefrom. He is thus not within the scope of Preiser v. Rodriguez, 411 U.S. 475 (1973). This case is also different from Billiteri v. U.S. Board of Parole, No. 75-6120 (2nd Cir., Aug. 30, 1976). The petitioner there specifically invoked the Court's habeas corpus jurisdiction, sl. op. 5298. Here, Plaintiff merely seeks a parole hearing that comports with notions of fundamental fairness, an appropriate subject for §1983 jurisdiction.

Plaintiff's classification as emotionally disturbed is based consists of pre-sentence probation reports, psychiatric progress notes and certain letters, including letters from then Chief Probation Officer Fastov, and Justice Cone (64-a). As shown in Point II, Post, this information is available to many persons including, in some cases, the prisoner himself. Thus, it is hardly confidential. Significantly, at no time during his twelve-year incarceration was Plaintiff ever committed to the hospital for the criminally insane under Correction Law §408.

Plaintiff claims that he was subject to special classification by the Department of Correctional Services (24-a). As a result of that classification he has been denied the opportunity to participate in temporary release programs authorized by New York Correction Law, Article 26. He has twice been denied participation in work release programs (44-a-45-a), and has twice been denied a furlough under the home visitation program (46-a).

C. The Habeas Corpus Action Filed in the District Court for the Eastern District of New York.

After he was denied parole, Mr. Williams commenced an action in the United States District Court for the Eastern District of New York, challenging the denial of parole? and the validity of the reasons for that denial. U.S., Ex. Rel. Williams v. Caldwell, 75 Civ. 1948 (O.G.J.). Judge Judd found

that the action sought immediate release from prison and treated it as a habeas corpus petition. In that action, Mr. Williams did not raise the issue litigated here. Indeed, nowhere in the complaint (Petition) did Plaintiff discuss the adverse psychiatric information which he seeks to discover in this action. Thus, that issue was not decided, nor could it have been decided by Judge Judd.

POINT I

THE DISTRICT COURT PROPERLY GRANTED PLAINTIFF JUDGMENT BY DEFAULT UPON DEFENDANTS' FAILURE TO PRODUCE EVIDENCE REQUESTED BY IT.

The grant or denial of judgment by default is within the sound discretion of the Trial Court. Missouri, Ex. Rel. Devault v. Fiderity Casualty Co. (8th Cir. 1939), as is the vacatur of that default. That discretion should not lightly be disturbed on appeal. C.F. Donofrio v. Camp, 470 F.2d 428 (D.C. Cir. 1972). Here, Defendants have defaulted at every stage of the litigation. (See pp. 3 - 6 ante). Whether through mere neglect, i.e., the action was "lost in the shuffle" (61-A), or intentional lack of good faith in dealing with an incarcerated pro-se litigant, Defendants should not be permitted to take advantage of their own errors.

Plaintiff's motion for summary judgment was granted after Defendants defaulted in producing evidence requested by the

District Court. F.R.C.P., §56(e) specifically prohibits a party from resting on his pleadings when opposing a motion for summary judgment. The burden is thus on the Defendants to come forward with evidence to show that there is a genuine issue of fact. First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968). See also, Beal v. Lindsay, 468 F.2d 287 (2nd Cir., 1972). Here the State could not rest on its pleadings for it never answered the complaint, and they produced no evidence until after the motion for judgment was granted.

It is settled that if the State had evidence sufficient to defeat Plaintiff's motion, they must produce it in a timely response to the motion for summary judgment. They cannot reserve their evidence for a possibly needless trial. Engl v. Aetna Life Insurance Co., 139 F.2d 469 (2nd Cir., 1943), Sams v. New York State Board of Parole, 352 F. Supp. 296 (S.D.N.Y. 1972). Yet this is precisely what the State tried to do in this case. On at least two separate occasions the District Court requested Defendants to submit evidence. The initial request was in the form of a letter from the Court to Hon. Louis J. Lefkowitz, Attorney General of the State of New York personally, and came after the Defendants' failure to respond to Plaintiff's motion (53-a). The second request was in the form of the order of April 7, 1976 (40-a), in which the Court set forth the factual deficiencies in Defendants' case, and

required evidence to be submitted within twenty days to fill in the gaps. Sixty days later that evidence had not been supplied (54-a). As the Court of Appeals for the District of Columbia Circuit said when it upheld a default judgment in Donofrio v. Camp, supra, 431 470 F.2d at 431:

> There seems little danger of injustice in the denial of a second continuance and the grant of summary judgment in this case. Appellant had been given his first continuance with a stern warning as to the consequences of failing to produce more evidence to support his allegations.

Not only are the Defendants in default at every stage of the action, despite the District Court's warnings of the consequences of that default, but as set forth in Point II, Mr. Williams is entitled to judgment as a matter of law. Thus, the District Court's refusal to accept evidence thirty days after the entry of the Defendants' default was entirely proper. Donofrio v. Camp, supra.

POINT II

DEFENDANTS ARE REQUIRED UNDER THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE, TO ADVISE APPELLEE OF ADVERSE INFORMATION IN HIS INSTITUTIONAL AND PAROLE FILE WHEN HE IS BEING CONSIDERED FOR PAROLE OR TEMPORARY RELEASE PROGRAMS

It is axiomatic that before a prisoner need be afforded minimal due process, he must have a liberty or property

interest at stake. That interest may be created by the State, although it need not be. Thus, a prisoner has a substantial interest in assuring that he is not arbitrarily deprived of good time. Wolff v. McDonnell, 418 U.S. 539(1974). He also has an interest in a fair procedure when the State attempts to revoke his parole Morrissey v. Brewer, 408 U.S. 471 (1972). Similarly, this Court, and others, including the Appellate Division of the New York Supreme Court, have held that at a minimum due process of law requires that a candidate for parole be given a statement of reasons when his parole is denied. U.S., Ex. Rel., Johnson v. Chairman, New York State Board of Parole, 500 F.2d 925 (2nd Cir., 1974) vacated as moot sub. nom. Regan v. Johnson, 419 U.S. 1015 (1974), Haymes v. Regan, 525 F.2d 540 (2nd Cir., 1975), Childs v. U.S. Board of Parole, 511 F.2d 1270 (D.C., Cir. 1974), Solari v. Vincent, 46 A.D.2d 453, 363 N.Y.S.2d 332 (2nd Dept. 1975), Cummings v. Regan, 45 A.D.2d 222, 357 N.Y.S.2d 260 (4th Dept. 1974).

Examination of New York's sentencing and parole scheme shows that the parole process is in reality an extension of the sentencing process. Indeed, it can hardly be denied that the stakes are the same, freedom to remain in or return to society, and the same considerations are applicable to both. For instance, the standards for the sentencing judge and the parole board are remarkably similar. Compare Penal Law, §65.00 which provides a person may be placed on probation if:

(i) Institutional confinement for term authorized by law of the defendant is or may not be necessary for the protection of the public;

(iii) Such disposition is not inconsistent with the ends of justice.

with Correction Law, §213 which declares that a prisoner may be released on parole if the Board is satisfied that "he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society."

In the New York scheme the Parole Board performs "a judicial function." Correction Law, §212 (10). That function is best illustrated by examination of the Board's role as set forth in Carrection Law, §212 (2), when the Court fixes an indeterminate sentence without specifying the minimum term. The Board interviews the prisoner between nine months and one year after sentence is imposed. It makes "a determination as to the minimum period of imprisonment to be served..." That determination "shall have the same force and effect as a minimum period fixed by a court..." This procedure bears a striking similarity to the Washington plan discussed in Mempa v. Rhay, 389 U.S. 128 (1967). In Washington, as in New York, according to the Supreme Court, the time to be served is fixed by the parole authority within a specified time after the inmate enters prison. Id. at 135. The Court there held that

when the procedure, labelled a "deferred sentencing," is utilized, the right to counsel applies. These examples justify the conclusion of the President's Commission on Law Enforcement that "[p]arole legislation is essentially a delegation of sentencing power to the parole board." Task Force Report on Corrections (1967) p. 86.

The similarity between the function of the sentencing judge and the parole board is heightened by the fact that virtually the same information is considered by each. The sentencing judge has before him a pre-sentence report which contains information bearing on the defendant's criminal history, his social, employment, family, economic,educational situation and his personal habits, and any other relevant information. It also contains the results of any physical or mental examination. C.P.L., §390.30 (1) and (2). The parole board has before it similar information updated to the time of parole consideration. Correction Law, §211, 214 (2). As summarized by the District Court in Zurak v. Regan, S.D.N.Y., No. 75 Civ. 4018 (R.L.C.), (Jan. 30, 1976), the parole folder consists of:

> (1) The presentence report of the local Department of Probation, (2) date supplied by the local correctional institution consisting of medical and psychiatric data and reports of any infractions of the local institutional rules and regulations, and a copy of the commitment, (3) the New York State

> Fingerprint Identification Record of Prior Arrests and Convictions, (4) the Conditional Release report prepared by the local parole office for the Board of Parole, and (5) correspondence from individuals such as family and friends who are acquainted with the applicant for conditional release.

Thus, in New York the parole process is an extension of the sentencing process, and the same procedural safeguards should apply, particularly the opportunity to rebut adverse information in the prisoner's file. C F. Mempa v. Rhay, supra. Under New York Law. C.P.L., §390.50 (2) the information is available to the prisoner at the time of sentence. There can be no valid reason for withholding it, and the updated information, at this later stage. (See Post pp. 18 - 20).

Not only does the logic of the sentencing and parole process compel the conclusion that Plaintiff must be permitted to inspect the material at issue; but his situation is squarely within the scope of this Court's decision in Cardaropoli, supra. His file was marked as a special offender or sensitive case (24-a, 45-a), on the basis of unspecified adverse information without giving him the measure of due process required by Cardaropoli. Neither the classification, nor its adverse consequences, denial of work release and furlough programs, and loss of opportunity for parole, were controverted or denied by the Defendants, and the District Court so found in its order denying Defendants' motion to vacate their default (71-a).

In Cardaropoli, supra, the Court found that designation as a Special Offender by the Federal Bureau of Prisons hinders or precludes eligibility for the same programs denied to Plaintiff here. The Court held that these "marked changes in the inmate's status" 523 F.2d at 995, are sufficient to create a grievous loss within the meaning of Morrissey v. Brewer, supra, 408 U.S. at 481 and may not be imposed without rudimentary due process. Plaintiff's loss is even greater. Although never certified as mentally or emotionally ill in accordance with the laws of New York State, he carries the stigma of that designation on the basis of information which he neither saw nor was given the opportunity to rebut. As this Court stated in Lombard v. Board of Education of the City of New York, 502 F.2d 631, 637 (2nd Cir., 1974):

> A charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding.

See also, Perry v. Sinderman, 408 U.S. 593 (1972), Velger v. Cawley, 525 F. 2d 334 (2nd Cir., 1975) cert. gr. U.S. (1976). Insofar as relevant here, the Cardaropoli Court required that the inmate be "fully informed... of the evidence against him and afforded a reasonable time to present

his side of the case." 523 F.2d at 996. Appellee is entitled to no less. Even under the Supreme Court's analysis of a prisoner's liberty interest in Meachum v. Fano, U.S. 96 S. Ct. 2532, (1976), and Montanye v. Haymes U.S. 96 S. Ct. 2543 (1976), Mr. Williams is entitled to the rudimentary due process he seeks. In Meachum the Court held that a prisoner derives his liberty interests from two sources: 1) those rights that are granted to him by specified provisions of the Constitution, and 2) those rights that are granted him by state law.[3] 96 S. Ct. at 2539, Cf. Wolff v. McDonnell, supra, 418 U.S. at 557. In New York the inmate derives his right to parole from statutes. Correction Law 210 et. seq. The temporary release programs, including furlough and work release programs are governed by Correction Law, Article 26. The eligibility requirements, as well as regulations governing an inmate's conduct while participating in the programs are specified in detail in Article 26. Under the statute every eligible inmate has the right to participate in the programs to further his own rehabilitation. The state

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3. Appellee disagrees with that analysis and believes that the dissent of Justice Stevens is in accord with the legal and historical analysis of individual liberty in this country.

created the right. It cannot deprive the inmate of it without affording him minimum due process safeguards, in this case the opportunity to see and rebut adverse information in his file, Meachum, supra, Wolff, supra, Morrissey, supra, Goldberg v. Kelly, 397 U.S. 254 (1970).

The major thrust of Appellant's argument is that the records are confidential (Appellant's Brief p. 11-13). That claim cannot stand for two reasons. First, the substantial liberty interest at stake far outweighs the State's interest in depriving the prisoner of information that is otherwise available to him and various other government agencies. (See Post). As the Supreme Court said in U.S. v. Nixon, 418 U.S. 68-, at 709, (1974), "The need to develop all relevant facts in the adversary system is both fundamental and comprehensive." Where a claim of privilege is interposed that would prevent full presentation of all relevant facts, the District Court is the arbiter of the validity of the claim. Zurak v. Regan, supra.

Second, the confidentiality of information in a prisoner's institutional and parole file is far from sacrosanct. Under New York law, a defendant or his attorney is entitled to examine the pre-sentence report prepared by the Probation Department. C.P.L., §390.50 (2).[4] In addition, parole violators have been held to be entitled to inspect their parole files

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4. This statute, enacted in the Spring of 1975, became effective September 1, 1975, eleven days before Plaintiff's parole hearing.

and any other documents or records relevant to matters which would arise during the course of a parole revocation hearing. In the Matter of LaDue v. Regan (Sup. Ct. Westchester Co., Index No. 7468/75, May 20, 1975); People, Ex. Rel. De Gaglia v. New York State Board of Parole (Sup. Ct. Dutchess Co., Index No. 3351/75, November 17, 1975); In the Matter of Smith v. Regan (Sup. Ct. Westchester Co., Index No. 5540/74, August 20, 1974); People, Ex. Rel. Morales v. Schubin (Sup. Ct. Westchester Co., Index No. 4417/74, April 5, 1974); People Ex. Rel. Johnson v. Schubin (Sup. Ct. Westchester Co., Index No. 15076/73, January 22, 1974).

Moreover, the medical and psychiatric information sought here is available to many agencies other than the parole board. Under former 7 N.Y.C.R.R., §5.20 (eff. Feb 14, 1975), which was in effect in September, 1975, those records were available to Mental Health Information Service, Correction Medical Review Board, judicial and administrative bodies before which the inmate's mental health is in issue, and various physicians, health, social services and welfare agencies. On April 22, 1976, before the Defendants were in default of the District Court's order, the regulation was amended to permit medical and psychiatric records to be given to social workers, the prisoner's attorney, and "other persons, in the discretion of the Commissioner..." upon written authorization signed by the inmate. 7 NYCRR, §5.20 (a) (6) - (8) (Eff. April 22, 1976). The inmate is sandwiched

between the sentencing stage and the parole violation stage. To deny him this material, when it is otherwise available, serves no valid purpose. To deny it to him or his attorney in violation of CPL, §390.50 (2) and 7 NYCRR, §5.20 (a) (7) is in itself a violation of due process of law. Agron v. Montanye, 392 F. Supp. 454 (W.D.N.Y. 1975).

Neither does this Court's decision in Billiteri v. U.S. Board of Parole, supra, bar the relief sought here. That case involved a federal prisoner who had been sentenced to a definite term of imprisonment. In the federal action he sought information pertaining to the seriousness of his crime. Under the law in effect at the time the case arose, there was no right, statutory or otherwise, to the pre-sentence report. Sl. op. 5296. Most significantly, at proceedings in the District Court, Billiteri and his counsel received a copy of the report and "had full opportunity at that hearing to rebut any or all of the statements contained therein and to point out to the Court any particular prejudice suffered...but they made no attempt to do so." Sl. op. 5296. Here, the information is available to all the world, yet the inmate for whom it has greatest significance is prohibited from inspecting the information so that he may rebut it.

Moreover, the interests at stake are substantially greater than in Billiteri. In addition to being denied parole,

Plaintiff is labelled a sensitive case and is denied participation in statutorily authorized temporary release programs. Most important, he is stigmatized with the label "emotionally disturbed" without knowing the evidence against him, and without being able to present contrary facts. Basic concepts of fundamental fairness require that he be given that opportunity.

POINT III

THE DISMISSAL OF THE HABEAS CORPUS ACTION IN THE EASTERN DISTRICT OF NEW YORK DOES NOT ACT AS A BAR TO THIS ACTION

This Court requires three elements to co-exist before the defense of res judicata will prevail:

> (1) There must have been a "final judgment on the merits" in the prior action;
> (2) the identical issues sought to be raised in the second action must have been decided in the prior action; and (3) the party against whom the defense is asserted must have been a party or in privity with a party to the prior action. Kreager v. General Electric Co., 497 F2d. 468, 472 (2nd Cir.) cert. den. U.S. (1974).

Zdanok v. Glidden Co., Durkee Famous Foods Division, 327 F.2d 944, 955 (2nd Cir.) cert. den. 377 U.S. 934 (1964). The only ground for application of res judicata raised by Defendants is that the same issues were litigated in U.S., Ex. Rel. Williams v. Caldwell, supra ("the Eastern District action"), and in this case ("the Southern District action"). Assuming,

without condeding, that requirements one and three are met, the identical issues raised in the Southern District action were not decided in the Eastern District action.

Identity of issues requires that the second suit between the same parties be brought on the same cause of action as the first. Lawlor v. National Screen Service, Corp., 349 U.S. 322, 326 (1955), U.S. v. General Electric Co., 358 F. Supp. 731, 738 (S.D.N.Y. 1973). One test for dtermining whether the causes of action are the same is whether the subject matter of both cases is essentially different. Woodbury v. Porter, 158 F.2d 194 (8th Cir., 1946).

The subject matter of the Southern District action and the Eastern District action are essentially different. The Southern District action, brought before Plaintiff had his parole hearing, was decided second. Plaintiff sought declaratory and injunctive relief to remove information labelling him emotionally disturbed from his file, or requiring Defendants to show him the information and giving him the opportunity to rebut it. The Eastern District action, brought after Plaintiff had been denied parole release, was decided first. In that action, treated as a habeas corpus proceeding by the Court, Petitioner challenged the reasons for his parole denial as being arbitrary and capricious. He sought

immediate release from custody, or in the alternative, a new parole hearing. Clearly, the Southern District action alleges a due process claim while the Eastern District action sounds in habeas corpus.

It is irrelevant that both actions arise from the same transactions or conditions as long as the proof is different in each. It does not matter that some evidence overlaps. As the Woodbury Court said, 158 F.2d at 195:

> Of course, the mere fact that the same evidence may be admissible under the pleadings in each action is not necessarily controlling, but even though the evidence may be admissible and is in part the same, but the subject matter is essentially different, the actions are not identical. In the final analysis the test would seem to be whether the wrong for which redress is sought is the same in both actions.

To sustain the Southern District action Plaintiff must prove that the adverse information exists in his file; that he was never informed of its nature and context and given an opportunity to rebut it; and that adverse consequences sufficient to constitute a grievous loss flowed from inclusion of the adverse information in his file. To prevail in the Eastern District action Plaintiff must prove that his detention was illegal; that the reasons given for denial of parole were invalid as a matter of law; or that the reasons

were arbitrary in that they are not supported by the record. While the psychiatric records may be used in both actions, the proofs required are very different. There is therefore no identity of issues, and the defense of res judicata cannot stand.

Nor does collateral estoppel help the Defendants. For that defense to stand the causes of action must be different, and "only those issues actually litigated and determined in the first action are conclusive in the second." U.S. v. General Electric Co., supra, 358 F. Supp. at 738. See also, Lawlor v. National Screen Service Corp. supra. The issue of Plaintiff's right to examine adverse information in his institutional file was neither raised in the Eastern District action, nor did Judge Judd decide it. Therefore Plaintiff is not collaterally estopped from raising the issue in the Southern District action.

CONCLUSION

Defendants have defaulted at every stage of the action. The District Court gave Defendants ample opportunity to come forward with evidence sufficient to rebut Plaintiff's motion for summary judgment. This they failed or refused to do. To paraphrase the Donofrio court, there seems little danger of injustice in the denial of further opportunity to do so. Moreover, Defendants do not have a meritorious defense. The

defense of res judicata is not available because issues in the Southern District action and the Eastern District action are different. Defendants do not deny that Plaintiff has been labelled a special offender, or sensitive case. He thus falls within the scope of Cardaropoli. Therefore he should be permitted to see the adverse information and be given the opportunity to rebut it. Accordingly, the judgment of the District Court should be affirmed.

Respectfully Submitted,

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Annex 1

UNITED STATES DISTRICT COURT

CHAMBERS OF
WHITMAN KNAPP
UNITED STATES DISTRICT JUDGE
UNITED STATES COURTHOUSE
NEW YORK, N. Y. 10007

July 1, 1976

Robert Hammer, Esq.
Assistant Attorney General
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Re: Williams v. Ward
75 Civ. 3838

Dear Mr. Hammer:

On June 25, 1976, you advised the Court ex parte of your intention to make a formal motion to set aside the default in the above case. To date, no papers on such motion have been received by us. Unless formal papers, having been duly served on the plaintiff, are received by the Court (1 copy by the Clark's Office for filing, 1 other copy to chambers) on or before July 9, final judgment will be entered and no further applications of any kind will be entertained.

Very truly yours,

Carolyn Sternschein
Law Clerk to Judge Knapp

cc: Michael Williams

Stephen Latimer, Esq.

Knapp Michael Williams -vs- Benjamin Ward, et al.

Annex 2

PROCEEDINGS

	(1) Filed complaint and issued summons.
5	(2) Filed Order that the pltff. is permitted to proceed in forma pauperis without prepayment of fees. Knapp,J.
03-75	(3) Filed true copy of order permitting pltff. to proceed in forma pauperis filed 8-6-75.
-03-75	(4) Filed summons with marhsaals return: Served, Commissioner of Correctional Services by M.Bezirjian on Chairman, N.Y. State Parole Board by B.B.Pomplum on 8-
)-29-75	(5)Filed affidavit of Michael Williams in opposition to deft's motion.
1-12-75	(6)Filed deft's notice of motion to dismiss complaint ret.12-5-75
1-12-75	(7)Filed deft's memorandum of law in support of his motion ret.12
1-14-75	(8)Filed Memo-Decision #43393:Pltff moved by notice of motion for order granting summary judgment.Pltff's motion is denied. on condition that deft's serve & file their answer and/or any motion withon 10 days of the entry of this memorandum & order. So ordered. Knapp,J. m/n
1-05-76	(9)Filed pltff's notice of motion for summary judgment ret. befor Knapp,J.on 1-9-76.
1-29-76	(10)Filed affidavit of B.S.Resnicoff in opposition to pltff's mot for summary judgment.
3-30-76	(11)Filed affidavit of facts by pltff, with affidavit of service.
04-09-76	(12)Filed Memorandum & order #44205: Ordered that within (20) d of the date of this order, the deft's are directed to do as indicated. So ordered. Knapp,J.
6-11-76	(13)Filed Memorandum & Order #44559: Pltff's motion for summary judgment granted, deft's being in default. So ordered.Kn Judgment Ent. Clerk. Ent.6-16-
7-09-76	(14)Filed deft's affidavit & notice of motion vacating the grant of summary judgment ret.7-23-76.
7-09-76	(15)Filed deft's memorandum of law in support of motion ret.7-23
7-16-76	(16)Filed affidavit of Michael Williams in reply to motion to vacate summary judgment issued by decision on 6-9-76.
7-23-76	(17)Filed Memorandum & order #44822: on 7-9-76 deft's moved for order vacating the grant of summary judgment to pltff. o default. the motion to vacate is denied, as indicated. So ordered. Knapp,J. m/n
8-04-76	(18) Filed Memo-Dec., The application for a stay is denied, as seems to be more appropriately addressed to the Court of A So Ordered. Knapp J. m/n pro-se
8-05-76	(19) Filed Judgement: Pltff's motion for summary judgement is granted on default. The Deft shall within 30 days of the fil of this judgement furnish pltff with:a.) copies of all unco dential material in his institutional file and, b.) a fair summary of confidential material which summary shall not r sources, but shall fairly state any conclusions adverse to pltff, which may be drawn therefrom. Not sooner than 10 day therafter, but in no event later than 60 days from the fil of this judgement, the Parole Board shall grant pltff a re release hearing. The case is hereby terminated, without pre to an application to restore it to the calender for the pur of enforcing the above specified relief. So Ordered. Knap
09-7 -76	(20) Filed deft's notice to appeal to the USCA from final judgm entered on 8-5-76. Mailed copy to Mr. Michael Williams, Arthur Kill Correctional Facility.

CERTIFICATE OF SERVICE

This is to certify that on October 18, 1976 a copy of the within appellees brief was served by mail on the Attorney General of New York at his offices at No. 2 World Trade Center, New York, New York.

STEPHEN M LATIMER
Attorney for appellee